Ref. No. 400

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,

Complainant,

v.

SOUTHWEST MARINE CORPORATION
A California Corporation,
d/b/a SOUTHWEST MARINE
CORPORATION-SAN PEDRO DIVISION,
TERMINAL ISLAND, CALIFORNIA,

Respondent.

8 U.S.C. SECTION 1324b
PROCEEDING
CASE NO. 88200036

Appearances:

Lawrence J. Siskind, Esq.
Isaias Ortiz, Esq. and
Chris D. Thomas, Esq., of
Washington, D.C., for the
Complainant.
William C. Wright, Esq.
of Littler, Mendelson, Fastiff
& Tichy, San Diego, Calif., for
the Respondent.

INTERIM DECISION AND ORDER DENYING
RESPONDENT'S MOTION TO DISMISS

EARLDEAN V.S. ROBBINS, Administrative Law Judge

Statement of the Case

This case was heard before me on various dates in October 1988. The charge was filed by Jose S. Miranda, herein called Miranda, on October 15, 1987 against the Southwest Marine Corporation, a California corporation d/b/a Southwest Marine Corporation-San Pedro Division, Terminal Island, California, herein called Respondent. On April 18, 1988, a Complaint Regarding Unfair Immigration Related Employment Practice issued alleging that Respondent has committed unfair immigration related employment practices in violation of

Section 274B(a)(1)(B) of the Immigration Reform and Control Act of 1986 (IRCA) [1] by knowingly and intentionally discriminating against Miranda by refusing to recall him to his job as a rigger because he was not a U.S. citizen. Thereafter, an amended complaint issued alleging that Respondent (1) in violation of 8 U.S.C. Section 274B(a)(1)(B) [2] refused to recall Miranda until on or about December 18, 1987, and (2) in violation of 28 C.F.R. Part 44 Subpart B, Section 44.201, retaliated against Miranda for filing the charge herein by laying him off as a rigger on February 12, 1988, and failing to recall him until April 15, 1988.

On May 24, 1988, Respondent filed its Answer to the Amended Complaint in which it alleged inter alia as affirmative defenses that (1) Miranda was not a citizen of the United States or an intending citizen within the meaning of Section 274B(a)(1)(B) and 274B(a)(3)(B); [3] (2) any alleged discrimination was permissible under Section 274B(a)(2)(c) and/or Section 274B(a)(4); [4] and (3) the charge was filed more than 180 days after the occurrence of matters alleged as unfair immigration-related employment practices [5]

At the conclusion of the hearing, counsel for the Respondent moved to dismiss the Complaint on the grounds that the charge was not timely filed and that Miranda was not an intending citizen. I reserved ruling on the Motion but agreed, at the urging of the parties, to issue a bifurcated decision herein with an interim decision covering only the two affirmative defenses raised in the Motion To Dismiss. The parties stipulated that for purposes of resolving the intending citizen issue, Miranda's testimony may be credited.

Upon the record, including my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs filed by the parties, I make the following:

Findings of Fact

I. The Timeliness of the Filing of The Charge

Section 274B(a)(1) of IRCA provides:

> "(1) General Rule.—It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the

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[1] 8 U.S.C. Section 1324b(a)(1)(B).

[2] 8 U.S.C. Section 1324(b)(a)(1)(B).

[3] 8 U.S.C. Section 1324(b)(a)(1)(B) and 1324(b)(3)(B).

[4] 8 U.S.C. Section 1324b(a)(2)(c) and/or Section 1324b(a)(4).

[5] See 8 U.S.C. Section 1324b(d)(3).

hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

"(A) because of such individual's national origin, or

"(B) in the case of a citizen or intending citizen (as defined in paragraph (3), because of such individual's citizenship status.

However, Section 274B(d)(3) provides:

"(3) TIME LIMITATIONS ON COMPLAINTS.—No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1).

The facts relevant to the timeliness of the filing of the charge are undisputed. The charge was filed on October 15, 1987. [6] On April 14, Miranda, who was then on layoff, telephoned his superintendent, Raymond Rudolph, and inquired as to when he would be recalled from layoff. Rudolph said he could not recall Miranda because he was not a citizen. About a week later, thinking that Rudolph may have been confused, Miranda went to the personnel office and spoke to Nancy Yuppa. When he asked her when he would be recalled she also told him he could not be recalled because he was not a citizen.

At that time, Miranda observed a sign posted in the personnel office which stated that U.S. citizenship was a requirement for employment at Respondent's facility. This sign, or a similar one, remained posted in the personnel office until after the charge herein was filed. Further, from at least April 1987 until after the charge was filed, Respondent placed job advertisements in newspapers which included a citizenship requirement for both blue collar and white collar jobs.

Respondent argues that if there was any unfair immigration-related employment practice, it occurred on April 14 when Rudolph told Miranda he could not be recalled because he was not a U.S. citizen. Therefore, according to Respondent, the charge was untimely filed 184 days after the alleged unfair immigration-related employment practice occurred.

Complainant argues that Respondent's conduct constitutes continuing violations which occurred within the 274B(d)(3) 180-day period. Respondent refutes this position by relying upon Delaware State College v. Ricks, 449 U.S. 250 (1980) and its progeny. In Ricks, a state college librarian was denied tenure. Subsequently, as a result of the lack of tenure, the librarian was discharged. He filed suit alleging that the denial of tenure deprived him of his rights under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. Section 1981, 101 S.Ct. 498; but argued that the limitations period began to run from the date of his discharge.

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[6] All dates herein will be in 1987 unless otherwise indicated.

The Court found that the allegedly illegal denial of tenure was the discriminatory act and the subsequent discharge was only the consequence of such discriminatory act. In holding that the limitations period commenced with the discriminatory act—the denial of tenure—and not the consequence of such act--the discharge--the Court stated:

> [T]he only discrimination alleged occurred—and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to Ricks.... That is so even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the discriminatory acts not upon the time at which the consequences of the acts became most painful." ... It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." ... The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present violation exists." (Emphasis in original) (footnotes omitted)

The Court further explicated this principle in Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28 (1981) where the alleged illegal acts were employee terminations. The Court rejected the First Circuit's attempt to distinguish Ricks on the ground that there the alleged illegal act was denial of tenure whereas in Chardon the terminations were the alleged illegal act. In holding that, for limitation purposes, the crucial factor is the time of the alleged discriminatory act rather than the effective date, the Court noted that in both Ricks and Chardon, "the operative decision was made—and notice given—in advance of a designated date on which employment terminated." The Court further noted, "In Ricks, we held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. . . . The fact of termination is not itself an illegal act."

However, nothing in these decisions diminishes the principle of continuing violations as explicated in United Air Lines, Inc. v. Evans , 431 U.S. 553 (1976). In that case, Evans had been forced to resign in 1968 pursuant to a United policy, later declared violative of Title VII, of refusing to allow its female flight attendants to be married. Several years later, she was hired as a new employee and unsuccessfully sought seniority credit for her years away from work. She contended that the denial of seniority credit for those years during which she was unlawfully deprived of employment were a continuing violation of her rights under Title VII. In rejecting Evan's contention of a continuing violation, the Court distinguished between continuing impact and continuing violations. Specifically, the Court stated: "United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity, the critical question is whether any present violation exists.

This distinction continues to be recognized by the courts. Reed v. Lockheed Aircraft Corporation, 613 F.2d 757, 761 (9th Cir. 1980); Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984); Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982). In the latter case the court stated:

The doctrine of continuing violations, as one court observed, is "actually a conglomeration of several different ideas." Elliott v. Sperry Rand Corp., 79 F.R.D. 580, 585 (D.Minn.1978). For present purposes, however, the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. Id. at 585-86. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. A minority employee who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed. With regard to such discrimination in promotion, this court has accepted the following formulation:

> [A] challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future. [citations omitted]

The situation may be different, however, with regard to complainants who have ceased to be employees or never were employees. A refusal to hire or a decision to fire an employee may place the victim out of reach of any further effect of company policy, so that such a complainant must file a charge within the requisite time period after the refusal to hire or termination, or be time-barred. If in those cases the victims can show no way in which the company policy has an impact on them within the limitations period, the continuing violation doctrine is of no assistance or applicability, because mere "continuing impact from past violations is not actionable. Continuing violations are." Reed v. Lockheed Aircraft Corp., 613 F.2d at 760; see United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977).

We agree with the trial court that in this case Owens-Illinois' refusals to hire and terminations did not give occasion to apply the continuing violations doctrine....

The trial court erred, however, in concluding that the continuing violations doctrine did not apply to discriminatory placements or denials of promotions. It should not have barred consideration of such events that may have occurred prior to the limitations period. The reason is that appellants were entitled to base claims on such discriminatory acts if they could show that these acts continued as violations because the supporting discriminatory policy carried forward into the limitations period and had its effect on employees....

In Roberts v. North American Rockwell Corp., 650 F.2d 823 (6th Cir. 1981) the employer refused to give an applicant an application for employment

and, over a period of several months, repeatedly told her she would not be hired because she was a woman. The company asserted that a hiring should be treated the same as a discharge, and therefore the limitations period commenced when she was first told the company did not hire women. In rejecting this argument, the court stated:

> If a company discriminates by firing an employee because of his/her race or sex, the discriminatory act takes place when the employee is fired. The statute of limitations ordinarily starts running from this date. [citations omitted]...
>
> The issue becomes more difficult when a company fails to hire or promote someone because of their race or sex. In many such situations, the refusal to hire or promote results from an ongoing discriminatory policy which seeks to keep blacks or women in low-level positions or out of the company altogether. In such cases, courts do not hesitate to apply what has been termed the continuing violation doctrine. [citations omitted]
>
> ...Neither logic nor precedent supports Rockwell's position. First, by definition, if there is a continuing violation, the company is continually violating Title VII so long as its discriminatory policy remains in effect. An applicant for employment or promotion will, in many circumstances, be interested in any suitable position which opens up. As job openings become available, the applicant will automatically be rejected because of his/her race, sex or national origin. We see no reason to formalistically require an applicant to continuously apply, only to be continuously rejected. We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well....
>
> Rockwell relies heavily on United Airlines v. Evans, supra. This reliance is misplaced....Evans cannot apply in a case such as this, involving discrimination in hiring, since each time the company hires, it violates Title VII so long as its discriminatory policy is in effect.
>
> Rockwell's alleged policy of not considering women for employment in its Winchester axle plant is a patent violation of Title VII. The seniority system used in Evans may have perpetuated past discrimination, but the seniority system did not itself violate Title VII....

Application of these cases to the circumstances herein clearly show a continuing violation since Respondent refused to recall Miranda pursuant to its ongoing policy of requiring employees to be U.S. citizens. Further, the principle of continuing violation has previously been applied, or noted with favor, in cases involving discriminatory failure to recall or rehire. Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 987-988 (D.C. Cir. 1973); Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1354 (9th Cir. 1981.) Jurinko v. Wiegand Company, 477 F.2d 1038 (3rd Cir. 1973) vacated and remanded on other grounds, 414 U.S. 970 (1973).

However, Respondent asserts that Section 274B(a) clearly encompasses only discriminatory discharges and refusals to hire and that bypassing a temporarily laid-off employee cannot be equated with the refusal to hire situation proscribed by the Act. Rather, Respondent argues, whatever rights or expectations Miranda had were extinguished when Rudolph notified him he would not be recalled because of his non-citizenship status. Therefore, according to Respondent, Rudolph's statement was a de facto act of discharge and the limitations period began to run when the termination decision was communicated to Miranda.

I find this argument somewhat disingenuous. A discharge involves the separation of the employment relationship. That is not what occurred here. Rudolph admits that if non-naval work had become available, Miranda would have been recalled. Thus Miranda remained an employee albeit with diminished recall rights. Employment on naval vessels—the only employment available during the critical period therein—was denied him because of his citizenship status. Specifically, he was denied work pursuant to Respondent's ongoing policy of requiring employees to be U.S. citizens.

Further, I reject Respondent's interpretation of the scope of Section 274B(a)(1)(B) as too narrow. Although it might be arguable that discrimination as to some types of working conditions are outside the purview of the Section, a recall from a "temporary" layoff is by its nature similar in effect to a "hiring." In both instances the employee assumes a working status where none had existed immediately prior thereto and in both instances a discriminatory refusal to "employ" results in a total lack of work for the employee.

In these circumstances, and upon a consideration of the cases cited above, I find that the charge and the complaint herein allege continuing conduct within the purview of Section 274B(a)(1) and that the charge was timely filed.

II. Miranda's Status As An Intending Citizen

IRCA protects only "citizens" and "intending citizens" against citizenship status discrimination. Both categories are defined in the Act and Respondent contends that Miranda does not fall within either category.

Section 274B(a) provides:

> "SEC. 274B. (a) PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS. —
>
> "(1) GENERAL RULE.—It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharge of the individual from employment—
>
> "(A) because of such individual's national origin, or
>
> "(B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

"(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

* * *

"(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, state, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

"(3) DEFINITION OF CITIZEN OR INTENDING CITIZEN.—as used in paragraph (1), the term 'citizen or intending citizen' means an individual who—

"(A) is a citizen or national of the United States, or
"(B) is an alien who—
"(i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208, and

"(ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen; but does not include (I) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (II) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

The facts pertinent to this issue are undisputed. Miranda became a permanent resident of the United States in 1970 but took no steps to become a citizen until 1985. On March 25, 1985, he filed a petition for naturalization and took, but failed, the requisite tests. On that same day he requested a retest as soon as possible. Subsequently, he was retested three times, the last of which was August 11, 1986. A major factor contributing to his lack of success on the tests was his inability to write in English. During an August 13, 1986 preliminary interview, an officer of the Immigration and Naturalization Service (I.N.S.) advised Miranda to withdraw his petition for naturalization and stated that, if he did not do so, he would have to wait four years before he could refile. Miranda requested to see a supervisor for further explanation of the reason for this advice. The supervisor verified the accuracy of the information the INS officer had given. Whereupon, on August 13, 1986, Miranda filed a Request For Withdrawal of Petition For Naturalization. Attached to the request is a notation by the INS officer, "Subject is unable to satisfy the requirement of writing English and is not exempt by Section 312." Immediately thereafter Miranda embarked upon a program of regularly working with his son several times a week to achieve fluency in reading and writing English. The first alleged discriminatory act occurred on

April 14, 1987. On November 30, 1987 he filed a Declaration of Intending Citizen. At the time of the hearing herein he had obtained the necessary application for reapplying for naturalization. However, he had not filed the application.

Thus Miranda meets the threshold requirement for protection under Section 274B(a)(1). He is lawfully admitted for permanent residence and he has completed a declaration of intention to become a citizen. However, Section 274B(a)(3)(B) further narrows the class of protected aliens by certain exclusions from the definition of "intending citizen." Respondent relies upon these exclusions which sets forth a six-month time frame for applying for naturalization and a two-year period for completing the timely initiated naturalization process. Specifically, Respondent argues that Miranda first became eligible to apply for naturalization in 1975 after five years of permanent residency and thus is not an "intending citizen" since he did not apply within six months after he became eligible. At the latest, Respondent urges, Miranda was required to have applied for naturalization within six months of November 6, 1986, the date of enactment of IRCA, in order to be an "intending citizen" within the meaning of Section 274(B). Thus, Respondent concludes, Congress clearly intended to establish a cutoff date of May 6, 1987, and to accord Miranda the status of "intending citizen" would indefinitely extend the cutoff period beyond that deliberately selected by Congress.

That argument is not persuasive. Although Miranda failed to apply for naturalization when he first became eligible in 1975 or 1976, the statute provides for filing later than six months after initial eligibility provided that such later filing is before May 6, 1987, six months after the enactment of IRCA. I reject Respondent's argument that a "later" filing can be timely only if it occurred prior to the enactment of IRCA. It is clear, from legislative history, that congressional intent in enacting this provision was to guard against the possibility that employers, in an excess of caution, would seek to avoid the possibility of sanctions by refusing to hire persons based on national origin or citizenship status. [7] Considering this intent and the clear language of the statute encompassing filing at a time later than that related to first eligibility, I cannot conclude that Congress intended to exclude from the protection of Section 274B(a)(1) aliens otherwise encompassed within the definition of "intending citizen" who applied for naturalization prior to the enactment of the statute. Rather, I would read part (I) of the 274B(a)(1)(3)B) exclusions to require application for naturalization within six months after the date the alien first becomes eligible to apply or within six months after the date of enactment of IRCA, whichever is later.

Additional questions which will be considered together are whether, despite the above, withdrawal of his petition for naturalization places Miranda within the ambit of exclusion (I) and whether he falls within exclusion (II). Respondent correctly asserts that Miranda has not been naturalized as a citizen within two years after the date of his application and that as of May 6, 1987 (six months after the enactment of IRCA) he did not have on file a petition for naturalization. However, Respondent does not consider, within this context, the effect of the qualifier set forth in the second exclusion. That exclusion

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[7] Joint Explanation Statement of The Committee of Conference, H.R.Rep. No. 99-1000, pp. 85, 87-88.

provides that "intending citizen" does not include otherwise eligible aliens who have not been naturalized as a citizen within two years after the date of the application, unless the alien can establish that he or she is actively pursuing naturalization. Thus, the second exclusion only creates a presumption that an alien who does not acquire citizenship status within two years is not an "intending citizen." This presumption can be rebutted by showing that the alien is actively pursuing naturalization.

Here, the facts establish that Miranda has met this burden. Clearly the very act of withdrawal of his petition for naturalization was taken in order to protect his pursuit of citizenship status. He withdrew not because of lack of interest or change of intent, but because he was advised by the INS that failure to withdraw would delay his pursuit of citizenship status. He took steps to increase his ability to read and write English and at the time of the hearing herein had obtained the necessary papers to reapply for naturalization. In these circumstances, I find that Miranda has shown that he is actively pursuing naturalization and thus does not come within exclusion (II). I further find, in view of Congressional intent to protect aliens who are actively pursuing naturalization and my finding above that his petition for naturalization was withdrawn in furtherance of his pursuit of citizenship, that said withdrawal does not place Miranda within exclusion (I). Accordingly, I find that Miranda is an "intending citizen" within the meaning of Section 274B(a)(1)(3).

Conclusions of Law

1. The charge herein was timely filed.

2. Miranda is an "intending citizen" entitled to the protection of Section 274B(a)(1).

Accordingly, IT IS HEREBY ORDERED:

1. Respondent's Motion to Dismiss is denied.

2. This Interim Decision is not a final Decision and Order.

Earldean V.S. Robbins
Administrative Law Judge

Dated: June 9, 1989

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